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 9 GERALD ARMSTRONG and THE
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FILED

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF MARIN

11	CHURCH OF SCIENTOLOGY INTERNATIONAL,)	No. 157 680
12	a California not-for-profit)	
13	religious corporation,)	
14	Plaintiff,)	ARMSTRONG'S AMENDED
15	vs.)	MEMORANDUM IN OPPOSITION
16	GERALD ARMSTRONG; MICHAEL WALTON;)	TO MOTION FOR SUMMARY
17	THE GERALD ARMSTRONG CORPORATION)	JUDGMENT
18	a California for-profit)	
19	corporation; DOES 1 through 100,)	
20	inclusive,)	
21	Defendants.)	Date: September 9, 1994
22)	Time: 9:00 a.m.
23)	Dept: One
24)	Trial Date: 9/29/94

I. INTRODUCTION

In its motion for summary judgment, Scientology rests solely on the litigation privilege derived from Civil Code section 47.

As we argue below, summary judgment should not be granted as to the first cause of action. The portion of the Miscavige declaration which defames and attacks Armstrong was filed by Miscavige in an effort to avoid being deposed and had nothing to do with Armstrong who had been mentioned months before in the context of an opposition to a summary judgment motion as a victim

1 of Scientology's use of the judiciary as an tool of Fair Game.

2 1/

3 Summary judgment as to the second cause of action should be
4 denied because Scientology used the fruits of discovery in this
5 action for an ulterior purpose not allowed by this litigation, and
6 violated an order of the discovery referee that financial
7 documents produced by Armstrong were to be viewed by counsel only.
8 Scientology used the fruits of discovery herein in a "Dead Agent
9 Pack," ^{2/} which it distributed to the media for the purpose of
10 assassinating Armstrong's character.

11 **II. THE MISCAVIGE DECLARATION IS NOT PRIVILEGED**

12 On February 8, 1994, in CSI v. Fishman Scientology's leader,
13 David Miscavige (Scientology's Ex. J at 5:8-6:16, 13:21-22), ^{3/}
14 executed a declaration in support of a motion asking a federal
15 judge to review a magistrate's order that he submit to deposition

16 _____
17 ¹ Fair Game has been judicially recognized as a practice
18 of Scientology since 1976, and as Scientology's practice toward
19 Armstrong from 1984 through 1991. (Allard v. Church of
Scientology, (1976) 58 Cal.App.3d 439, 443, 129 Cal.Rptr.797;
Wollersheim v. Church of Scientology, (1989) 212 Cal.App.3d 872;
Church of Scientology v. Armstrong (1991) 232 Cal.App.3d 1060)

20 ² Hubbard defined a "dead agent caper" as follows:
21 "The "dead agent caper" was used to disprove the lies. This
22 consisted of counter-documenting any area where the lies were
23 circulated. The lie "they were_____" is countered by a document
24 showing "they were not." This causes the source of the lie and any
other statements from that source to be discarded." (Separate
Statement at ¶ 25) The Dead Agent procedure is to counter "Black
Propaganda." (Id. at ¶¶ 24-15)

25 ³ It is interesting to note that both Miscavige and CSI
26 share the same attorney, Michael Lee Hertzberg of New York City.
27 (Armstrong's Evidence, Exh. 2, Declaration of Ford Greene, Exh. 2A
28 Non-Parties' Notice of Compliance Re Discovery in CSI v Fishman,
Geertz, USDC Cen. Dist. of California, No. CV 91-6426 HLH(Tx),
Exh. 2B, Notice of Non-Opposition to Application for an Order
Admitting Michael Lee Hertzberg as Counsel Pro Hac Vice in
Scientology v. Armstrong, LASC No. BC 052395)

1 because he had been avoiding service of a subpoena. (Id. at 2:15-
2 17, 9:15-18) Miscavige was not a party to the action. Miscavige
3 takes this opportunity to attack Armstrong as a "liar," whom
4 Miscavige claims as having falsely stated that he was "in fear of
5 his life" from Scientology's use of Fair Game.

6 Miscavige testified

7 For example, Mr. Young repeats the allegations made
8 by Gerry Armstrong that the Church practices "Fair Game"
9 and that Gerry Armstrong was in "fear of his life." To
10 bolster the validity of this allegation, Vaughn Young
11 refers to the Breckenridge decision. What Mr. Young
12 fails to disclose, however, is the fact that following
13 that opinion, Armstrong was proven a liar. In a police-
14 sanctioned investigation, Gerry Armstrong was captured
15 on video tape acknowledging his real motives, namely a
16 plot to overthrow the Church leadership and gain control
17 of the Church. On those very video tapes, Armstrong
18 acknowledges he not only isn't "afraid," but that he
19 "will bring the Church to its knees." While plotting
20 his overthrow attempt he gives advice that the Church
21 should be accused of various criminal acts. When told
22 no evidence exists to support such "charges," he
23 responds, "just allege it." It should be noted that
24 while Gerry Armstrong had been an "informant" during the
25 IRS criminal investigation, based on these tapes and
26 statements, the IRS dropped him as a witness, thereby
27 repudiating his credibility. Vaughn and Stacy Young
28 were fully aware of these facts as Stacy wrote the cover
story in Freedom Magazine that exposed Armstrong's plot.

(Separate Statement at ¶ 8)

Vaughn Young had not said anything regarding statements made
by Gerald Armstrong. In opposition to a motion for summary
judgment, Fishman and Geertz' supplied testimony from Vaughn Young
per declaration executed October 23, 1993. Young had been a
member of Scientology from 1969-1989 and testified regarding
Scientology's use of the judicial system to implement the Fair
Game policy to rebut CSI's statements to the contrary. Young
stated

In fact Fair Game did continue. Although the Guardian's

1 Office was "disbanded,": a new campaign was undertaken
2 against Gerry Armstrong in 1981, a staff member who had
3 fled with some of Hubbard's files. Contrary to what Mr.
4 Farny said, there were Fair Game actions taken against
5 Armstrong after the GO was "disbanded." I know because
6 I sat in on those strategy meetings and was ordered by
7 Hubbard as well as David Miscavige to "get Armstrong."
8 For example, Hubbard ordered a "reward" poster that
9 would characterize Armstrong as a criminal. (I did not
10 comply with the order, for which I was severely berated
11 by Miscavige. [¶] The use of Fair Game on Armstrong
12 was confirmed in 1984 when California Superior Court
13 Judge Paul Breckenridge, Jr., ruled against Scientology
14 with an opinion that included a statement about the
15 civil rights of members and Hubbard: "In addition to
16 violating and abusing its own members civil rights, the
17 organization over the years with its 'Fair Game'
18 doctrine has harassed and abused those persons not in
19 the Church whom it perceives as enemies. The
20 organization clearly is schizophrenic and paranoid, and
21 this bizarre combination seems to be a reflection of its
22 founder LRH. The evidence portrays a man who has been
23 virtually a pathological liar when it comes to history,
24 background and achievements. The writings and documents
25 in evidence additionally, reflect his egoism, greed,
26 avarice, lust for power, and vindictiveness and
27 aggressiveness against persons perceived by him to be
28 disloyal or hostile."

(Separate Statement at ¶8)

In order for the Civil Code section 47 privilege to apply in
litigation, a communication must have "an objective relationship
to the litigation." (Shavar v. Superior Court (1994) 30
Cal.Rptr.2d 597, 598-599; Younger v. Solomon (1974) 38 Cal.App.3d
289, 301)

A document is not privileged merely because it has
been filed with a court or in an action. The privileged
status of a particular statement therein depends on its
relationship to an actual or potential issue in an
underlying action.

(Shavar, 30 Cal.Rptr.2d at 599)

In Younger v. Solomon, supra., respondent served an
interrogatory to appellant regarding a complaint filed against
appellant with the state bar and attached a copy of said complaint

1 as an exhibit. Based on said use of discovery, appellant cross-
2 complained against the lawyer who so used discovery. Summary
3 judgment was granted as to the cross-complaint. The court of
4 appeal reversed. The court of appeal stated:

5 The term "process" as used in the tort of abuse of
6 process has been broadly interpreted to encompass the
entire range of procedures incident to litigation.
7 (Barquis v. Merchants Collection Association 7 Cal.3d
94, 104, fn 4 ...) Barquis explains the rule in this
8 manner:

9 ". . . In Thorton v. Rhoden (1966) 245 Cal.App.2d 80,
94-95 . . ., the court recognized that while 'the giving
10 of a notice that a deposition will be taken is not
"process" in the strictest sense of the word . . . in a
11 proper case [the] abuse of the powers that a litigant
derives from the taking of a deposition on proper notice
12 gives such notice that of "process" for the purpose of
the tort [of abuse of process].' Similarly, in Tellefsen
v. Key System Transit Lines (1961) 198 Cal.App.2d 611,
13 613 . . ., the court, while finding no abuse in the case
before it, recognized that under certain circumstances,
14 the taking of an appeal could give rise to an abuse of
process. (See also Tranchina v. Arcinas (1947) 78
15 Cal.App.2d 522 . . . (eviction under false pretense
constituted abuse of process)). Other jurisdictions
16 have recognized the propriety of an abuse of process
action when a plaintiff has intentionally misfiled an
17 action for an improper purpose. (see Bond v. Chapin
(1844) 49 Mass. (8 Met.) 31.) This broad reach of the
18 'abuse of process' tort can be explained historically,
since the tort evolved as a 'catch-all' category to
19 cover improper uses of the judicial machinery that did
not fit within the earlier established, but narrowly
20 circumscribed, action of malicious prosecution.

21 The gist of the tort is the misuse of the power of
the court: It is an act done under authority of the
22 court for the purpose of perpetrating an injustice,
i.e., a perversion of the judicial process to the
23 accomplishment of an improper purpose. [citations] Some
definite act or threat not authorized by the process or
24 aimed at an objective not legitimate in the use of the
process is required. And generally, an action lies only
25 where the process is used to obtain an unjustifiable
collateral advantage. For this reason, mere vexation or
26 harassment are not recognized as objectives sufficient
to give rise to the tort. [citations]

27 (Younger v. Solomon, supra, 38 Cal.App.3d at 296-297)
28

1 In the case at bar, the Miscavige declaration calling
2 Armstrong a "liar" did not have any logical relation to the
3 proceeding. Miscavige's declaration was submitted in an effort to
4 avoid being deposed. In the course of this effort, Miscavige
5 claim to rebut the declaration of Vaughn Young submitted in
6 opposition to a summary judgment motion brought by Scientology
7 months earlier. In paragraph 54 of his declaration Miscavige
8 states that Young stated that Armstrong had been in "fear of his
9 life" due to the Fair Game attacks upon him. Young, however,
10 never made any such claim. Thus, Miscavige uses a falsehood
11 ("fear of his life") in a motion (to avoid being deposed)
12 unrelated to that which he addresses (opposition to summary
13 judgment) in order create the justification of an attack on
14 Armstrong's reputation and character ("liar").

15 Such conduct is not protected by the privilege.

16 "The terms 'related to' or 'connected with' necessarily
17 require more than a remote relationship or common
18 factual genesis between two otherwise unconnected
19 subjects. To come within the privilege, the fact
20 communicated itself must have some bearing on or
21 connection with the subject matter of the litigation."

22 (Solomon, 38 Cal.App.3d at 302)

23 Such is not the case here.

24 **III. AN ISSUE OF FACT EXISTS AS TO WHETHER OR NOT**
25 **SCIENTOLOGY'S USE OF DISCOVERY CONSTITUTES AN**
26 **ABUSE OF PROCESS**

27 Pursuant to discovery, Scientology produced a Dead Agent
28 Pack. (Separate Statement at ¶¶ 19-23) In part, it stated:

29 In 1990, Armstrong began to undertake actions which
30 directly violated the agreement he had made. This
31 placed him at risk that the Church would move to collect
32 the damages that Armstrong's breaches entitled it to.
33 To make it impossible for the Church to collect any
34 damages, he fraudulently conveyed all his property

1 including real property, personal property and cash to
2 his friends and to a corporation he set up for that
3 purpose, which he called, "The Gerald Armstrong
4 Corporation."

5 One of the recipients of Armstrong's assets was an
6 attorney named Michael Walton. Prior to signing the
7 settlement agreement with the Church, Walton had advised
8 Armstrong about the terms and conditions of the
9 agreement. Walton also knew of Armstrong's intention to
10 breach the agreement and was fully aware of the
11 fraudulent nature of the conveyance."

12 (Separate Statement at ¶24)

13 CSI secretary Lynn Farny authenticated the Dead Agent Pack
14 and admitted that he participated in its preparation. (Separate
15 Statement at ¶ 23)

16 Farny testified that the source of the allegation in the
17 "Dead Agent" document "Who is Gerald Armstrong?" that Michael
18 Walton was "fully aware of the fraudulent nature of the
19 conveyance" was "discovery exchanged back and forth in this case,"
20 "deposition testimony by [Armstrong]," and "documents produced in
21 this case, correspondence between [Walton and Armstrong]."

22 (Separate Statement ¶ 22)

23 Farny testified that the Dead Agent Pack was distributed to
24 the media. (Separate Statement at ¶ 23) Such is an abuse of the
25 judicial process and is not protected by the litigant's privilege.

26 Since the communication of materials filed in, or that are a
27 part of, litigation to an unrelated third party (here, the media)
28 is not covered by the litigation privilege, Armstrong's second
cause of action is not precluded. (Shahvar, supra., 30
Cal.Rptr.2d at 599; Silberg v. Anderson (1990) 50 Cal.3d 205, 219)

Documents of Armstrong and The Gerald Armstrong Corporation
were produced in this case subject to a protective order which
states:

1 Immediately prior to Gerald Armstrong's deposition
2 session of March 17, 1994, and after acting as Referee
3 appointed by the Court in this case, I had conducted an
4 in camera review of certain documents that Mr. Armstrong
5 and the Gerald Armstrong Corporation had produced in
6 response to CSI's First and Second Requests for
7 Production to Gerald Armstrong and CSI's First Second
8 Request for Production to The Gerald Armstrong
9 Corporation, I produced certain of those documents to
10 CSI pursuant to a protective order to which the parties
11 stipulated on that date.

12 Said protective order was that the distribution of
13 said documents was to be limited to the attorneys in
14 this litigation and the use of said documents would be
15 restricted to this litigation.

16 Farny wrote in his declaration in support of Scientology's
17 motion for summary judgment (CSI's Evidence, Exhibit 4):

18 "I have reviewed the documents that were produced by
19 defendants Gerald Armstrong and Michael Walton. Those
20 documents were shown to me by the Church's attorneys
21 when they were produced by defendants.

22 I did not give the documents, or the copies of the
23 documents, to anyone else, nor have I authorized their
24 use or distribution for any purpose other than the
25 preparation of this case for trial. The documents have
26 not been used by me or by any of the Church staff,
27 agents, employees or representatives for any other
28 purpose."

29 Farny has not identified any of the other "Church staff,
30 agents, employees or representatives" who were provided
31 Armstrong's documents in violation of the protective order. It is
32 sufficient to know that a violation has occurred which cannot be
33 undone. This too is an abuse of the judicial process.

34 ///

35 ///

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1 IV. CONCLUSION

2 Based upon the foregoing arguments, Gerald Armstrong
3 respectfully submits that Scientology's motion for summary
4 judgment should be denied.

5 DATED: August 29, 1994

HUB LAW OFFICES


By: FORD GREENE
Attorney for Defendant
GERALD ARMSTRONG

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PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of eighteen years and am not a party to the above entitled action. My business address is 711 Sir Francis Drake Boulevard, San Anselmo, California. I served the following document:

ARMSTRONG'S AMENDED MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California:

Andrew H. Wilson, Esquire
Wilson, Ryan & Campilongo
235 Montgomery Street, Ste. 450
San Francisco CA 94104

Also by Telecopier

Laurie J. Bartilson, Esquire
Bowles & Moxon
6255 Sunset Boulevard, Ste 2000
Los Angeles, CA 90028

Also by telecopier

Michael L. Walton, Esquire
P.O. Box 751
San Anselmo, CA 94979

- (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Anselmo, California.
- (Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DATED: August 29, 1994


